

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TRUSTEES OF THE CONSTRUCTION
INDUSTRY AND LABORERS HEALTH
AND WELFARE TRUST, et al.,

Plaintiffs,

vs.

DEMO & DOORS ENTERPRISES,

Defendant.

Case No. 2:12-cv-01542-GMN-CWH

CERTIFICATION OF FACTS
FOR CIVIL CONTEMPT

Before the Court is Plaintiffs' Motion for Attorney Fees (#16), filed March 24, 2014.¹ Plaintiffs request an order requiring Defendant to pay \$8,416.00 as a contempt sanction for the repeated failure to comply with the Court's orders.

BACKGROUND

This case began when, on August 29, 2012, the parties filed a Stipulated Consent Judgment ("Judgment") in favor of Plaintiffs. (#1). The stipulated Judgment was for the sum of \$179,984.00 against Defendant "for delinquent employee benefit contributions, liquidated damages, interest, and attorney's fees and costs." The parties stipulated to the following facts:

1. Defendant was a signatory and bound by the terms of a collective bargaining agreement ("CBA"), in which it agreed to abide by trust agreements.
2. Under the CBA and the trust agreements, Defendant was obligated to pay employee contributions to trust funds on behalf of bargaining unit employees.
3. Defendant was delinquent in contributing funds for the period of January 2012 - March 2012.
4. Defendant owes the funds (a) \$138,543.00 in unpaid employee benefit contributions, (b) past interest of \$2,482.00, (c) liquidated damages of \$29,709.00, (d) administrative fees of \$3,000.00, and past attorney fees of \$1,250.00. The total monetary amount owed to the

¹ A copy of the motion was served on Defendant Demo & Doors Enterprises on March 26, 2014 through its registered agent for service of process. (#17).

1 fund was \$174,984.00.

2 5. In the event the judgment must be executed, the parties agreed that an additional
3 \$5,000.00 would be included.

4 The stipulated Judgment was approved on April 19, 2013, by the presiding District Judge in this
5 matter – Chief Judge Gloria M. Navarro. (#3).

6 Thereafter, on October 31, 2013, Plaintiffs filed a post-judgment motion for a judgment
7 debtor examination. (#5). The motion indicated that Defendant had failed to satisfy the judgment
8 and requested an examination pursuant to Fed. R. Civ. P. 69. The motion for judgment debtor
9 examination was referred to the undersigned and granted on November 5, 2013. (#6). Defendant
10 was ordered to appear on December 18, 2013 in the office of Plaintiff's counsel for the
11 examination. Defendant was further precluded from effectuating the transfer or interference with
12 any property not exempt from execution. *Id.* Plaintiffs were instructed to personally serve the
13 order on Defendant. Defendant was specifically informed that “[f]ailure to appear [at the
14 judgement debtor examination] may subject [it] to sanctions for contempt of court.” *Id.* On
15 December 2, 2013, Plaintiffs filed an affidavit of service indicating that a copy of the order setting
16 the judgment debtor examination was served on Defendant by “personally delivering and leaving a
17 copy . . . Alana Duggan[,]” who is identified as Defendant’s registered agent for service of process.
18 (#8).

19 On January 23, 2014, Plaintiffs filed a motion requesting that Defendant be required to
20 show cause why it should not be held in contempt for failure to produce a witness at the December
21 18, 2013 judgment debtor examination. (#9). The motion indicated that neither Defendant nor
22 anyone acting on its behalf appeared at the examination. The motion included a certification of
23 nonappearance (attached as exhibit 1), which included a statement from Plaintiffs’ counsel that he
24 had not received any communication from Defendant or been provided any documents.

25 Based on the facts and evidence set forth in the motion (#9), the motion was granted and an
26 order to show cause issued. The order to show cause included the following specific requirements:

27 1. That Defendant show cause in writing why it should not be sanctioned pursuant to, *inter*
28 *alia*, the Court’s inherent authority, LR IA 4-1, and Fed. R. Civ. P. 16(f), including
certification that Defendant be held in civil contempt, for its failure to comply with the
Court’s order (#6) and failure to appear at the scheduled judgment debtor examination.

1 Defendant was given until February 21, 2014 to provide a written response.

2 2. That Defendant appear for a show cause hearing on Tuesday, March 18, 2014 at 2:00
3 PM before the undersigned and show cause why the Court should not impose sanctions
4 pursuant to, *inter alia*, the Court's inherent authority, LR IA 4-1, and Fed. R. Civ. P. 16(f),
including a certification for civil contempt.

5 3. Defendant was specifically instructed that, absent a court order, "THE FAILURE TO
6 FILE A SHOW CAUSE BRIEF AND/OR TO APPEAR AT THE MARCH 18, 2014
SHOW CAUSE HEARING WILL RESULT IN CERTIFICATION THAT
7 DEFENDANT/JUDGMENT DEBTOR DEMO & DOORS ENTERPRISES BE HELD IN
CONTEMPT."

8 4. Plaintiff was instructed to serve a copy the order on Defendant.

9 5. The Clerk of Court was instructed to mail a copy of the order to Defendant's registered
agent for service of process via certified mail.

10 *See* Order (#10). Defendant signed for the certified mail delivery of the order on January 29, 2014.

11 (#12). Plaintiff filed an affidavit of service indicating that the order was served on Defendant's
12 registered agent for service of process on January 28, 2014. (#13). Thus, the record shows that
13 Defendant was aware of the order to show cause (#10) and its requirements approximately three
14 weeks before the written brief was due and approximately five weeks before the scheduled show
15 cause hearing.

16 The show cause hearing went forward on March 18, 2014. Neither Defendant nor a
17 representative for Defendant appeared. Plaintiff's counsel requested that the Court enter an order
18 finding Defendant in contempt for the failure to appear. The undersigned indicated to counsel his
19 intent to certify facts for a contempt finding. In aid of that effort, Plaintiff's counsel was requested
20 to submit an affidavit summarizing the facts and circumstances of the case as well as the efforts
21 undertaken to serve Defendant. Plaintiff, through counsel, submitted the requested affidavit on
22 March 24, 2014. In addition to summarizing the facts and circumstances of the case, Plaintiff
23 requested an order requiring Defendant to pay \$8,416.00 as a sanction for the repeated failure to
24 comply with the Court's orders. The requested amount correlates to specified activities undertaken
25 and fees incurred as a result of preparing for and attending the prior hearings and examinations at
26 which Defendant failed to appear or otherwise participate. The motion was served on Defendant
27 via its registered agent. (#17).

DISCUSSION

As an initial matter, the Court notes that Plaintiff's motion for attorney fees (#16) is a request that the Court find Defendant in contempt for its continued failure to comply with court orders and impose a monetary sanction equivalent to the fees incurred as a result of Defendant's failures. Under the circumstances, and pursuant to 28 U.S.C. § 636(e), the undersigned must "certify the facts" to a district judge for a determination of whether contempt is appropriate. Section 636(e) provides, in relevant part, that in matters referred to a magistrate judge pursuant to section 636(a) or (b):

[T]he magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

See 28 U.S.C. § 636(e)(6). The party seeking an order of contempt has the burden of establishing by clear and convincing evidence that: (1) the party against whom contempt is sought violated a court order, (2) beyond substantial compliance, and (3) not based on a good faith reasonable interpretation of the order. *United States v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010).

It is not specified in the motion whether Plaintiff is requesting that Defendant be held in civil contempt, criminal contempt, or both. Whether contempt is criminal or civil is determined by the nature and purpose of the sanction. Generally, a sanction intended to punish past conduct, imposed for a definite amount or period without regard to future conduct, is criminal. If the sanction is intended to coerce compliance with a court order in the future, and is conditioned on continued noncompliance, it is civil. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1481 (9th Cir. 1992), *citing Hicks v. Feiock*, 485 U.S. 624, 632 (1988). Where the court imprisons or imposes fines in order to coerce compliance with the court's order, and the contemnor can avoid or terminate by complying with the order, the contempt is civil. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005) (citations omitted). Contempt sanctions imposed to compensate another party or the court for harm caused or losses sustained by a contemnor's

1 disobedience are civil. *Lasar*, 399 F.3d at 1110-11 (monetary sanctions imposed to compensate
 2 party for unnecessary costs and attorney's fees are compensatory, remedial fines and considered to
 3 be civil in nature).

4 To protect against abuse and ensure due process, individuals subject to contempt sanctions
 5 are afforded procedural protections, the nature of which varies depending on the violation and
 6 severity of the sanction. The more punitive the nature of the sanction, the greater the protection
 7 entitled. *F.J Hanshaw Enterprises, Inc. v. Emerald River Development*, 244 F.3d 1128, 1137 (9th
 8 Cir. 2001). At minimum, the party subject to civil or criminal contempt sanction is entitled to
 9 notice and an opportunity to be heard. *Lasar*, 399 F.3d at 1109-10. Before serious criminal
 10 penalties may be imposed for direct or indirect contempt, the contemnor must be afforded the full
 11 protection of a criminal jury trial. *Hanshaw*, 244 F.3d at 1138-39 (citations omitted).

12 The undersigned hereby certifies that the acts described in this order constituting contempt
 13 have occurred. 28 U.S.C. § 636(e)(6)(B).² After entry of the Judgment, Defendant was ordered to
 14 appear for a judgment debtor exam on October 31, 2013. Defendant was served with a copy of the
 15 order setting the examination, but, without explanation, failed to appear. Thereafter, the
 16 undersigned entered an order requiring Defendant to show cause in writing why he should not be
 17 sanctioned for his failure to comply with the Court order and appear the judgment debtor
 18 examination. Defendant was specifically warned that failure to appear at the show cause hearing
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20
 21 ² Federal Rule of Civil Procedure 69 provides that the procedure regarding "proceedings supplementary
 22 and in aid of judgment or execution—must accord with the procedure of the state where the court is located." *See*
 23 *Fed. R. Civ. P. 69(a)(1)*. Rule 69 further provides that "[i]n aid of judgment or execution, the judgment creditor
 24 or a successor in interest whose interest appears of record may obtain discovery from any person—including the
 25 judgment debtor—as provided in these rules or by the procedure of the state where the court is located." *Fed. R.*
 26 *Civ. P. 69(a)(2)*. Under Nevada law, "[a] judgment creditor, at any time after the judgment is entered, is entitled
 27 to an order from the court requiring the judgment debtor to appear and answer upon oath or affirmation
 28 concerning his or her property, before: (a) The judge or a master appointed by the judge; or (b) An attorney
 representing the judgment creditor, at a time and place specified in the order. *See Nevada Revised Statutes*
 ("NRS") 21.270(1). "A judgment debtor who is regularly served with order issued pursuant to this section, and
 who fails to appear at the time and place specified in the order, may be punished for contempt by the judge
 issuing the order." NRS 21.270(3). Further, "[a] court of the United States shall have power to punish by fine or
 imprisonment, or both, at its discretion, such contempt of its authority, and none other, as [d]isobedience or
 resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3).

1 on March 18, 2014, would result in the certification of facts and recommendation that contempt
2 sanctions be entered. A copy of the order requiring Defendant to show cause was delivered to
3 Defendant at its last known address by certified mail. (#12). Defendant was also served with a
4 copy of the order through its registered agent for service of process. (#13). Based on the record,
5 Defendant was aware of the order and show cause requirements approximately three weeks before
6 the written show cause brief was due and approximately five weeks before the scheduled show
7 cause hearing. Neither Defendant nor a representative for Defendant appeared at the show cause
8 hearing. Upon request that the undersigned enter an order finding Defendant in contempt for the
9 failure to appear, Plaintiff's counsel was instructed to submit an affidavit summarizing the facts
10 and circumstances of the case as well as the efforts undertaken to serve Defendant. Plaintiff
11 complied with the request and submitted his motion for fees (#16) requesting \$8,416.00 as a
12 contempt sanction for the repeated failure to comply with the Court's orders.

13 Based on these facts, the undersigned recommends that the District Judge find the
14 Defendant in civil contempt. Plaintiff's motion for attorney fees (#16) is granted to the extent that
15 the undersigned recommends the \$8,416.00 requested in attorney fees be awarded as a fine for civil
16 contempt. The fees incurred represent specific harm or loss caused by Defendant's failure to
17 comply with the Court's orders. *See Lasar*, 399 F.3d at 1110-11 (monetary sanctions imposed to
18 compensate party for unnecessary costs and attorney's fees are compensatory, remedial fines and
19 are considered to be civil in nature). The motion for fees was unopposed, and the hourly rates and
20 time expended are reasonable. The undersigned also recommends that the District Judge order
21 Defendant to appear at a date and time certain for a judgment debtor examination. Should
22 Defendant fail to appear at the scheduled examination, the undersigned recommends that Defendant
23 be sanctioned \$100 a day until such time as it complies with the Court order to appear for a
24 judgment debtor examination.

25 The undersigned further recommends that if Defendant fails to appear at the contempt
26 hearing the District Judge issue an arrest warrant for Defendant's corporate officers to be
27 incarcerated until Defendant purges itself by complying with the Court's orders. *See United States*
28 *v. Bright*, 596 F.3d 683, 696 (9th Cir. 2010) (holding that "[g]iven the remedial purpose of the

1 sanction, a finding of contempt must be accompanied by conditions by which contempt may be
2 purged, spelled out in either the original order or the contempt order.”). The Supreme Court has
3 held that courts have power “to impose conditional imprisonment for the purpose of compelling a
4 person to obey a valid order,” and that “[s]uch coercion, where the defendant carries the keys to
5 freedom in [its] willingness to comply with the court’s directive, is essentially a civil remedy
6 designed for the benefit of other parties and has quite properly been exercised for centuries to
7 secure compliance with judicial decrees.” *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) (citation
8 omitted).

9 Defendant is a Nevada corporation. In each of the instances identified herein that
10 Defendant has failed to respond or otherwise comply with the Court’s orders, it has been served via
11 its designated agent for service of process. *See* NRS 14.020. The designated agent for service of
12 process also signed the certificate of receipt confirming receipt of the Court’s order (#10) via
13 certified mail. (#12). The undersigned has independently consulted the public record, conducting a
14 business search of the Nevada Secretary of State website, in search of further information on the
15 Defendant.³ Defendant Demo & Doors Enterprises is identified as a Nevada corporation.
16 Defendant’s “status” is listed as being in default, with a business license that expired on September
17 30, 2013. The registered agent for service of process remains National Registered Agents,
18 Incorporated, located at 311 S. Division Street, Carson City, Nevada 89703. Every reported officer
19 in the corporation is identified as Kevin R. Curley. The corporate address is listed as 2700 East
20 Patrick Lane #15, Las Vegas, Nevada 89120.

21 In *Electrical Workers Pension Trust Fund of Local Union #58, IBEW v. Gary’s Elec.*
22 *Service Co.*, 340 F.3d 373 (6th Cir. 2003), the court held that the sole officer and shareholder of the
23 defendant, who was not himself a party, could be held in contempt for the defendant’s failure to
24 obey the court’s judgment and order. It was further held that the district court abused its discretion
25 in denying plaintiff’s request that the officer be held in contempt. The Sixth Circuit quoted the
26 Supreme Court’s statement in *Wilson v. United States*, 221 U.S. 361, 376 (1911) as follows: “A
27

28 ³ <https://nvsos.gov/sosentitysearch/CorpSearch.aspx>

1 command to the corporation is in effect a command to those who are officially responsible for the
2 conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance
3 or fail to take appropriate action within their power for the performance of the corporate duty, they,
4 no less than the corporation itself, are guilty of disobedience and may be punished for contempt.”
5 *Electrical Workers Pension Trust Fund*, 340 F.3d at 380. In order to hold a corporate officer in
6 contempt, the movant must show that he or she had notice of the order and its contents. *Id*; *see also*
7 *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988) (“A nonparty may be held liable for
8 contempt if he or she either abets or is legally identified with the named defendant . . . [a]n order
9 to a corporation binds those who are legally responsible for the conduct of its affairs.”).

10 It is not clear whether Defendant’s lone officer (according to Nevada records) is aware of
11 the events outlined herein. Given the repeated service of Defendant’s designated agent for service
12 of process, it seems unlikely that he would not be aware. The undersigned will instruct the Clerk’s
13 office to provide a copy of this order to the registered agent for service of process as well as upon
14 the corporate officer at the address listed on the Nevada Secretary of State website via certified
15 mail. Plaintiff will also be required to serve a copy of this order on both the registered agent for
16 service of process and the corporate officer. To the extent that Defendant or its officer do not
17 appear at the contempt hearing, Plaintiff shall supply the last known address, to the extent known,
18 of the corporate officer/s so that an arrest warrant may issue and the corporate officer/s
19 incarcerated, such incarceration conditioned on the willingness to comply with the Court’s orders.
20 *Uphaus*, 360 U.S. at 81.

21 Based on the foregoing and good cause appearing,

22 **IT IS HEREBY ORDERED** that a hearing is scheduled before **Chief District Judge**
23 **Gloria M. Navarro** on **Tuesday, September 2, 2014 at 9:00 a.m in Courtroom 7D at the Lloyd**
24 **D. George Courthouse, 333 Las Vegas Boulevard South, Las Vegas, Nevada 89101**, wherein
25 the Defendant is order to show cause why he should not be found in civil contempt and sanctioned
26 as set forth herein.

27 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Attorney Fees (#16) is **granted**
28 to the limited extent that the undersigned certifies the foregoing facts and recommends the

1 following sanctions for civil contempt:

2 1. \$8,416.00 in attorney fees and costs for specific harm or losses caused by Defendant's
3 failure to comply with the Court's orders;

4 2. A fine of \$100.00 a day to commence should Defendant or its representative fail to
5 appear at the contempt hearing scheduled herein until such time as Defendant complies with the
6 order to appear for a judgment debtor examination.

7 3. Should Defendant fail to appear for the contempt hearing, arrest warrants should issue
8 and the following corporate officers shall be incarcerated until such time as Defendant complies
9 with the Court's order to submit to a judgment debtor examination:

10 Kevin R. Curley
11 2700 East Patrick Lane #15
12 Las Vegas, Nevada 89120

13 **IT IS FURTHER ORDERED** that Plaintiff shall serve a copy of this Certification of Facts
14 for Contempt on both the Defendant's registered agent for service of process and all known
15 corporate officers, including Kevin R. Curly.

16 **IT IS FURTHER ORDERED** that Plaintiff shall attend the September 2, 2014 show cause
17 hearing and bring, to the extent it is known or can be ascertained, the contact information for
18 Defendant and its officers.

19 **IT IS FURTHER ORDERED** that the Clerk of Court shall send a copy of this
20 Certification of Facts for Contempt and Order Setting Contempt Hearing to the following via
21 certified mail:

22 Demo & Door Enterprises
23 c/o National Registered Agents, Inc. of Nevada
24 Commercial Registered Agent
25 311 S. Division Street
26 Carson City, NV 89703

27 Kevin R. Curley
28 2700 East Patrick Lane #15
Las Vegas, Nevada 89120

DATED: July 30, 2014.



C.W. Hoffman, Jr.
United States Magistrate Judge